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In The

Supreme Court of the United States

October Term 1995

DONALD G. SCHLEY,

Petitioner,

v.

COLLEGE OF CHARLESTON;
MARTIN PERLMUTTER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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59 pp

QUESTIONS PRESENTED

1. Whether religious discrimination occurs when a government employer, out of concern that it not violate the establishment clause, screens out job applicants who "might be inclined to proselytize".

2. Whether a job applicant who meets none of an employer's objective hiring qualifications can be "better qualified," as this Court has applied the term in Title VII cases, than a job applicant who meets all of the employer's objective hiring qualifications.

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PETITION FOR WRIT OF CERTIORARI

Donald G. Schley respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review the judgment entered in this action by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit giving rise to this petition is unpublished but is reprinted at App. A-1 through A-9. The opinion of the United States District Court for the District of South Carolina is also unpublished but is reprinted at App. A-10 through A-31. The opinion of the United States District Court for the District of South Carolina on the Petitioner's Motion to Alter Judgment is unpublished but is reprinted at App. A-32 through A-37.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on April 23, 1996. Donald G. Schley's Petition for Rehearing with Suggestion for Rehearing In Banc was denied May 21, 1996. App. A-155. The jurisdiction of the United States Supreme Court is invoked under the United States Constitution and 42 U.S.C. § 2000e-2(a).

STATUTES INVOLVED IN THE CASE

I. U.S. CONST. Amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. 42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer-

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Donald G. Schley (hereinafter "Dr. Schley") attempted to obtain a tenure-track position as a professor at the College of Charleston during academic years 1988-89, 1989-90, and 1990-91. The College is a state supported institution located in Charleston, South Carolina. Dr. Schley sought a position with the College's Department of Philosophy and Religious Studies (hereinafter "the Department").

Dr. Schley initially submitted his resume unaware that information about his religion would be held against him. To avoid violating the establishment clause, the Department attempted to "screen out candidates who might be inclined to proselytize." Applicants whose resumes raised "red flags" did not make the first cut. The inclusion of information on resumes about church participation was a "red flag." An applicant who "mention[ed] his or her religious affiliation in a vitae [was] going to have that counted against his or her candidacy;" such a revelation "carried a modicum of weight against the candidate."

Because Dr. Schley's resume contained references to his involvement in church and teaching Sunday School, the Department became aware that he was a practicing Christian. His resume raised concerns that Dr. Schley "would proselytize in the classroom" and may not "understand a role of a professional academic."

Dr. Schley did not make the first cut during the 1988-89 search. However, the prevailing candidate backed out at the last minute. A member of the Department, who had attended Emory University with Dr. Schley, helped him obtain a visiting professorship with the Department. Dr. Schley was

warned by his friend, who sat on the search committee, "not to reveal his political and religious views." App. A-3.

While a visiting professor at the College during academic year 1989-90, Dr. Schley attempted to obtain a tenure-track position in Biblical Studies. The Department placed an ad in an attempt to hire a professor who met several objective qualifications. The qualifications were nonnegotiable. An applicant who failed to meet any of the objective qualifications was to have been eliminated. The objective qualifications outlined in the ad for the 1989-90 search, as recognized by all those who testified regarding the hiring decision and taken verbatim from the ad, were: "Ph.D. required"; "the area of specialization is in Biblical Studies"; and "demonstrated excellence in teaching an absolute requirement."

Dr. Schley met all of the objective qualifications outlined by the Department. The prevailing candidate literally met none of the objective qualifications. Dr. Schley was passed over again, because the prevailing candidate was considered better qualified based upon his education and his academic promise.

II. Procedural Background

On November 24, 1992, Donald G. Schley brought an action based on violations by the College of Title VII, the First Amendment, and 42 U.S.C. § 1983. He contended the College maintained a policy of discrimination against committed religious people in general and Christians in particular. The Defendants filed an Answer on January 13, 1993, denying the material allegations in Dr. Schley's Complaint. Thereafter, the Defendants filed a Motion for Summary Judgment and To Strike Plaintiff's Demand for Jury Trial and Punitive Damages. The Plaintiff subsequently filed a Motion to Amend His

Complaint to add a specific prayer for injunctive relief in an effort to keep his 42 U.S.C. § 1983 cause of action alive.

The College's Motion for Summary Judgment and To Strike was referred to a Magistrate Judge, who also heard Dr. Schley's Motion to Amend the Complaint. The Magistrate Judge recommended that the Motion for Summary Judgment be denied with respect to Dr. Schley's Title VII and First Amendment causes of action on the basis of discriminatory statements by members of the Department and be granted with respect to Plaintiff's 42 U.S.C. § 1983 cause of action. It was further recommended that Dr. Schley's Motion to Amend be granted. The District Court accepted the Magistrate Judge's recommendation except with respect to Dr. Schley's Motion to Amend, which the Court denied.

The case came to trial before a Magistrate Judge on January 24, 1995. The Magistrate Judge entered judgment in favor of the College on February 8, 1995 having applied a McDonnell-Douglas analysis and found that Dr. Schley presented a prima facie case of discrimination but failed to prove the College's reasons for not hiring him were pretext. App. A-30 - A-31.

Dr. Schley filed a Motion to Alter Judgment or For a New Trial on the grounds that he had presented direct evidence of discrimination and that the Magistrate Judge had incorrectly applied the McDonnell-Douglas analysis rather than a Price-Waterhouse/direct evidence analysis. The Magistrate Judge responded with an Order on March 10, 1995 denying the Motion for a New Trial and insisting that he did not have to apply the Price-Waterhouse/direct evidence analysis. App. A-35 - A-36.

On appeal, the Fourth Circuit found that the College's policy was not discriminatory and that the Price-Waterhouse/direct evidence analysis was not warranted. App. A-9.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH THE EIGHTH CIRCUIT REGARDING THE EXTENT TO WHICH GOVERNMENTAL EMPLOYERS CAN LIMIT THE FREE EXERCISE OF RELIGION SO AS TO AVOID THE ESTABLISHMENT OF RELIGION.

A. The Eighth Circuit has found that religious discrimination in violation of Title VII and the First Amendment occurs when a governmental employer, out of concern that it not violate the establishment clause, allows an employee's religious activities to negatively affect his or her employment.

In Brown v. Polk County, Iowa, 61 F.3d 650 (8th Cir. 1995), a governmental employee, Isaiah Brown, had been reprimanded for "participating in activities that could be construed as the direct support of or the promotion of a religious organization or religious activities, utilizing the resources of Polk County government." He was later fired.

The Eighth Circuit found that Mr. Brown's religious activities had played a part in Polk County's decision to fire him. Id. at 654. Polk County contended that it had an "interest" in avoiding a claim that it had "violated the establishment clause." Id. at 659.

The Eighth Circuit found that Polk County's interest did not allow it to suppress religion in the workplace and stated that such a position was "too extravagant to maintain, for it gives a dominance to the establishment clause that it does not have and that would allow it to trump the free exercise clause." Id.

B. The Fourth Circuit, on the other hand, has found that discrimination does not occur when a government employer, out of concern that it not violate the establishment clause, screens out applicants who reveal religious activities on their resumes.

Petitioner presented significant direct evidence of religious discrimination. However, here the Petitioner only addresses the Department's admitted policy of attempting to "screen out candidates who might be inclined to proselytize." Dr. Richard Nunan, a tenured member of the Department who was familiar with hiring policies, testified:

Q: And one of those practices, Dr. Nunan, involved attempts by the Department to screen out candidates who might be inclined to proselytize. [Quoting from Dr. Nunan's deposition] Isn't that right?

A: Yes, if there was a concern that a candidate did not have the appropriate sensitivity to teach in a secular institution, that would be a worry.

Dr. Nunan testified that an applicant "who sees fit to mention his or her religious affiliation in a vitae is going to have that counted against his or her candidacy." He testified that revealing religious affiliations on a resume "carr[ied] a modicum of weight against a candidate."

The Department wanted to make sure that it hired people who understood the limitations of a state institution. Dr. Nunan testified that a candidate who revealed his religious affiliation perhaps thought the affiliation was "a relevant job qualification" and therefore that person would "be a misfit for

a position at a state institution." Dr. Nunan testified that Dr. Schley's resume did, in fact, cause the Department to worry that he might be a proselytizer.

Q: And we talked about evidence that would indicate that a person might be a proselytizer, or would tend to be, correct?

A: Or that might be a worry that one would

Q: . . . And there were some worries on Don Schley's vitae, weren't there?

A: Yes.

Q: One of those worries was his . . . that he sought fit to mention his involvement in church and Sunday School, teaching Sunday School, correct?

A: At some length.

Q: For example, on the first page he cited his participation in church as a favored family activity, correct?

A: Uh-huh.

Dr. Nunan was very specific about the issues that Dr. Schley's resume raised:

> "As far as I could determine, the issues which his original vitae raised - would Don proselytize in the classroom? Did he understand the role of a professional academic? - were laid to rest by his performance for the Department during his first year with us. These were problems which hurt Don's candidacy when he was a stranger to us."

Unlike the Eighth Circuit, the Fourth Circuit appears to have been impressed by the College's pure motives. The College was clearly attempting to avoid hiring professors who would turn their lecterns into pulpits, but these professors were subjected to prejudgment. The Fourth Circuit found that the policy did not constitute discrimination. App. A-8 - A-9.

II. THE TENSION BETWEEN THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE WITHIN THE CONTEXT OF GOVERNMENT EMPLOYMENT INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

This Court has previously referred to the First Amendment's establishment and free exercise clauses as "complementary." Emerson v. Board of Education, 330 U.S. 1, 15, (1947). How these clauses complement each other in government employment is somewhat uncertain. Government employers must not violate the establishment clause but at the same time cannot convey a message of governmental disapproval of religion or of "preferring those who believe in no religion over those who do believe." School District of Abington Townships v. Schempp, 374 U.S. 203, 225 (1961); Zorach v. Clauson, 343 U.S. 306, 314 (1952). This tension is significant and affects hundreds of thousands of governmental employers and employees, yet this petitioner is unaware of any opinion by this Court addressing this specific issue.

III. IT IS IMPORTANT FOR EMPLOYERS AND EMPLOYEES TO KNOW WHETHER COURTS WILL RELY ON OBJECTIVE JOB QUALIFICATIONS BEFORE RESORTING TO SUBJECTIVE FACTORS WHEN DETERMINING WHETHER ONE EMPLOYEE IS BETTER QUALIFIED THAN ANOTHER.

A. Dr. Schley met all of the minimal objective requirements established by the College, and the prevailing candidate did not meet any of the minimal objective requirements.

The chairman of the Department at all times relevant testified:

Q: And if a qualification is listed in the ad, and an applicant does not meet that qualification, than that would be eliminated?
A: Yes.
Q: Or should be eliminated?
A: Yes.

Dr. Hugh Wilder, who was chairman of the Department at the time of trial, stated:

> "The requirements in the advertisement are what we considered the necessary minimal requirements. . . "

The minimal objective qualifications, taken verbatim from the ad, were: "Ph.D. required"; "the area of specialization is in Biblical Studies"; and "demonstrated excellence in teaching an absolute requirement". The College

offered no evidence that the prevailing candidate met the specific qualifications. It was conceded that Dr. Schley met the qualifications. The College's expert testified:

> Q: Dr. Sanders, Dr. Schley had his Ph.D. and David Frankfurter didn't, correct?
>
> A: Yes.
>
> Q: Dr. Schley specialized in Biblical Studies and David Frankfurter didn't, correct?
>
> A: Yes.
>
> Q: And Dr. Schley had demonstrated excellence in teaching and David Frankfurter merely demonstrated that he is a prospect?
>
> A: I hesitate just a little over the word excellence. .

The College stipulated that Dr. Schley was qualified and merely contended that David Frankfurter was "better qualified." Both the District Court and the Fourth Circuit found that the College had merely made a difficult choice between well qualified applicants.

B. In addressing the term "better qualified," as this court has typically used it, the circuit courts should apply objective criteria prior to resorting to subjective factors.

Regardless of whether the McDonnell Douglas analysis or Price-Waterhouse/direct evidence analysis is applied, the issue of qualifications is typically addressed in Title VII cases. Unfortunately, Courts usually do not have written guidelines against which to compare applicants or employees.

The Fourth Circuit has previously noted the problem of subjectivity of employment decisions, especially in

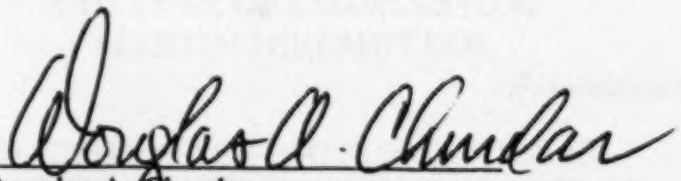
academic settings. In Smith v. University of North Carolina, 632 F.2d 316, the Fourth Circuit pointed out: the job sought by the applicant had not been reduced to "specific criteria" and stated that there were "very few departments which could reduce these factors to precise equations." Id. at 327; "[t]he department did not have a formal list of criteria for reappointment and promotion." Id. at 330; "[t]he Plaintiff criticizes the department's lack of written criteria and procedures to guide their decision making." Id. at 343. In Anderson v. City of Bessemer City, North Carolina, 717 F.2d 149, 153 (1983), the Fourth Circuit noted that: "The selection committee had not established prehiring guidelines for the recreation director's position. . ." This Court noted in Price-Waterhouse v. Hopkins, U.S. 228, 258 (1989) that evaluations based on subjective criteria provide much more room for personal prejudice work.

All of these cases appear to suggest that, where objective criteria exist, objective criteria should be applied before a Court resorts to subjective criteria in determining the relative qualification of employees or job applicants. It does not appear that any Court has addressed this issue, which will arise often in the Title VII cases. With guidance from this Court on the meaning of the term "better qualified," employers and employees may better understand how Title VII affects hiring and other employment decisions.

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioner's Writ of Certiorari.

Date: September 18, 1996



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No. _____

In The
Supreme Court of the United States

October Term 1995

DONALD G. SCHLEY,

Petitioner,

v.

COLLEGE OF CHARLESTON;
MARTIN PERLMUTTER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DONALD G. SCHLEY,
Plaintiff-Appellant,

v.

COLLEGE OF CHARLESTON;
MARTIN PERLMUTTER,
Defendants-Appellees.

No. 95-1932

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
William M. Catoe, Jr., Magistrate Judge.

(CA-92-3350-2-22AK)

Argued: December 6, 1995
Decided: April 23, 1996
Entered: April 23, 1996

Before WIDENER and NIEMEYER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Douglas A. Churdar, HUNTER & CHURDAR, P.A., Greenville, South Carolina, for Appellant. Katherine Dudley Helms, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Columbia, South Carolina, for Appellees. **ON BRIEF:** Terry E. Haskins, Greenville, South Carolina, for Appellant. Charles T. Speth, II, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Alleging that he was not hired for three tenure-track positions because of his religious beliefs, Donald Schley brought suit against the College of Charleston and Dr. Martin Perlmutter in his official capacity under 42 U.S.C. § 1983 and 42 U.S.C.§ 2000e et seq. (Title VII). The district court dismissed the § 1983 claims prior to trial. After a bench trial on the Title VII claims, the magistrate judge entered judgment for the defendants. On appeal, Dr. Schley contends that the district court erred by denying his motion to amend his complaint and by striking his motion for a jury trial. He also asserts that the magistrate judge applied an erroneous legal standard when assessing his Title VII claims. We affirm.

I

Dr. Donald Schley received his Ph.D. in Old Testament from Emory University in 1987 and passed doctoral

exams at the University of Gottingen in Germany. He had previously received his undergraduate degree from Eckerd College and his masters degree from the Candler School of Theology at Emory.

In 1988, Dr. Schley applied for a position as a tenure-track religious studies professor at the College of Charleston in Charleston, South Carolina. Later that same year, Dr. Schley attended the annual conference sponsored by the American Academy of Religion/Society for Biblical Literature seeking a permanent position in his field. At the Conference he met a friend, Dr. June McDaniel, who was an associate professor at the College. Dr. Schley gave her a copy of his curriculum vitae, which Dr. McDaniel then showed to Dr. Martin Perlmutter, the chairman of the Department of Philosophy and Religious Studies at the College. Dr. Perlmutter glanced at the vitae and returned it to Dr. McDaniel.

Following a search for faculty in 1988-89, the College hired Dr. Joseph Hoffman. Dr. Schley admitted at trial that he was less qualified than Dr. Hoffman. After Dr. Hoffman withdrew his acceptance, the College decided to wait a year to conduct another search for a tenure-track professor. In the meantime, to fill the continuing need for an instructor, the College created a one-year, visiting assistant professorship. This new position was not on the tenure track.

Dr. McDaniel resubmitted Dr. Schley's name, along with his newly revised vitae, to the hiring committee. At the suggestion of Dr. McDaniel, who had also told him not to reveal his political and religious views, Dr. Schley had removed the information in his vitae that did not relate to his professional experience or qualifications. This included information about his personal history and his experience teaching Sunday school. Dr. McDaniel and several other witnesses for the College testified that including personal information of this type in a vitae showed a lack of professionalism. Dr. McDaniel also testified that she advised

Dr. Schley not to discuss his political and religious views only because he had a tendency to get into heated arguments on these subjects.

Dr. Schley testified that during his final interview for the short-term position, Dr. Perlmutter told him that his initial vitae prevented the College from ever considering him for a tenure-track position. During cross-examination he admitted that Dr. Perlmutter merely told him that he would never teach at the College permanently. Dr. Perlmutter testified that he commonly informed visiting faculty that they were not automatically on track for tenure. He also testified that he had not referred to Dr. Schley's original vitae during the interview. The College offered Dr. Schley the one-year position, and Dr. Schley subsequently earned a reputation as a competent and well-liked teacher.

In the fall of 1989, the College once again began its search for a tenure-track professor. In an advertisement for the position, the College specified that it was seeking Ph.D. applicants with a demonstrated excellence in teaching and a specialization in Biblical Studies. The College considered over 100 applicants, including Dr. Schley, who submitted his revised vitae for consideration. Dr. Schley's candidacy was initially supported by several members of the Department. However, at the conclusion of the 1989-90 search, the College hired David Frankfurter after a majority of the faculty on the hiring committee determined that he had superior credentials.

Frankfurter had completed his doctoral courses in Religions of Late Antiquity at Princeton University and was in the process of finishing his dissertation. At trial, the College introduced evidence showing that it was its policy to consider an applicant who had completed all requirements for a doctorate except a dissertation. Dr. Perlmutter and the other members of the hiring committee also testified that they considered the prestige of the undergraduate and graduate institutions Frankfurter attended, the excellence of his recommendations, and his academic promise, as evidenced by

the depth of his scholarly interest and upcoming publications. In addition, he was publishing at an acceptable rate and was qualified to teach courses in Biblical Studies.

A number of the faculty members who participated in the hiring process testified that although Dr. Schley was a qualified candidate, his application was not as strong as that submitted by Frankfurter. Specifically, these individuals pointed to Dr. Schley's comparatively weak recommendations, his lack of relevant experience, and a belief that Dr. Schley was not as academically promising as Frankfurter.

After Dr. Schley fulfilled his contract, the College offered him a second one-year position as a visiting professor. In 1990, during his second year, the College advertised for an opening for a tenure-track assistant professor who could teach a variety of religious studies courses. The College specified that although the area of specialization was open, it was seeking to expand and was not interested in additional New Testament scholars. Although Dr. Schley applied for the position, several faculty members testified that they believed that Dr. Schley was not qualified because of his narrow focus on Biblical Studies. There was additional evidence that the individual who was eventually hired, Dr. Lee Irwin, was qualified to teach in several of the fields into which the College was expanding, including Islamic and Native American religious studies.

Dr. Schley introduced the testimony of a former faculty member and a student who alleged generally that the faculty was biased against committed Christians. This testimony was rebutted by other members of the faculty. Dr. Schley also testified that he was told by both Dr. McDaniel and Dr. Perlmutter that he belonged in a church-related school. Both Dr. McDaniel and Dr. Perlmutter testified that they had given Dr. Schley advice on ways to improve his vitae, telling him that only church-related schools would view all the information in his initial vitae as relevant. Another former student testified that he was told by Dr. Perlmutter that

"someone with a strong religious conviction like Dr. Schley would not be appropriate to teach a New Testament class." At trial, Dr. Perlmutter denied making such a statement. In addition, as a visiting professor, Dr. Schley taught two New Testament classes.

A number of professors on the hiring committee, including Dr. Perlmutter, were aware of Dr. Schley's religious beliefs and testified that those beliefs were never a consideration. They pointed to Dr. Irwin's vitae which listed his experience as a ministry associate for an ecumenical campus ministry. Other faculty members testified that they were not aware of Dr. Schley's beliefs during the relevant periods.

Dr. Schley brought suit under § 1983 and Title VII against the College and Dr. Perlmutter in his official capacity, seeking actual and punitive damages and "such other and further relief" as the court deemed proper. He alleged that he had been discriminated against during the College's searches for a tenure-track professor because of his religious beliefs. The district court dismissed the § 1983 claims and found that Dr. Schley was not entitled to a jury trial on the remaining Title VII claims. The district court also denied injunctive relief. After a bench trial, a magistrate judge entered judgment for the defendants.

II

Dr. Schley contends that the district court erred by dismissing his § 1983 claims, which were based on the First Amendment. He also contends that he was entitled to a jury trial on his First Amendment claims and to injunctive relief.

Applying the Eleventh Amendment, the court properly dismissed the claims for actual and punitive damages brought against the College and Dr. Perlmutter in his official capacity, because, under South Carolina law, any judgment entered against them would have been paid out of the state treasury.

See Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 462-63 (1945). Also, neither states nor state officials acting in their official capacities are persons within the meaning of § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Because as a matter of law Dr. Schley could not recover actual and punitive damages, he was not entitled to a jury trial on those claims.

Dr. Schley argues that his prayer for general relief entitled him to prospective injunctive relief that precluded dismissal of his action against Dr. Perlmutter in his official capacity. He argues in the alternative that the district court erred by denying his motion to amend his complaint to add a prayer for injunctive relief against Dr. Pennhurst in his official capacity.

The district court's denial of Dr. Schley's motion to amend to seek injunctive relief need not detain us. His prayer for "general relief" entitled him to all the relief justified by the evidence. Fed. R. Civ. P. 54(c). The Eleventh Amendment does not prohibit all suits for prospective injunctive relief brought against state officials in their official capacities. Edelman v. Jordan, 415 U.S. 651, 664-67 (1974). We conclude, however, that it was within the court's discretion not to create an injunctive remedy against Dr. Perlmutter in his official capacity. The district court denied the injunction, noting that Dr. Schley had not taught at the College for three years and had a position in another college. It held that he lacked standing to represent taxpayers and future applicants. However, we need not rest our affirmance of the district court's denial of injunctive relief on these grounds. After the trial on Dr. Schley's Title VII claims, it became clear that the College did not discriminate on religious grounds, and no injunction was warranted. Since a request for injunctive relief is equitable in nature, Dr. Schley was not entitled to a jury.

III

By consent, the magistrate judge conducted the trial on the Title VII issues. See 28 U.S.C. § 636(c). The Title VII claims, which were based on events before the enactment of the Civil Rights Act of 1991, did not entitle Dr. Schley to a jury. See Landsgraf v. U.S.I. Film Products, 114 S. Ct. 1483 (1994).

The evidence discloses that from hundreds of applicants, the selection committees, acting without bias against any candidate on account of religion, chose the most qualified applicants. The witnesses testified why they believed the successful candidates' credentials were superior to those of Dr. Schley. Their testimony showed no taint of discrimination, and the magistrate judge's acceptance of their explanations is amply supported by the evidence. Several persons who were not on the selection committees attributed religiously prejudicial remarks to Dr. Perlmutter, who denied them. Upholding Dr. Perlmutter and other faculty members who were accused of bias, the magistrate judge made credibility findings that are justified by the record.

The magistrate judge first analyzed the case according to the formula of McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). He found that Dr. Schley presented a prima facie case and consequently considered the defendants' evidence. At this stage of the proceedings, the presumptions raised by the prima facie case dropped from the case, and the factual inquiry became whether the defendants discriminated against Dr. Schley because of his religion. United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-16 (1983). The magistrate judge's conclusion that the evidence did not disclose discrimination is supported by substantial evidence.

In response to Dr. Schley's Rule 59 motion, the magistrate judge again properly denied a jury trial on both the § 1983 claims and the Title VII claims. Dr. Schley's argument

that this is a mixed-motive case lacks merit. Even if it were such a case, the defendants proved by a preponderance of the evidence that religious discrimination played no part in the College's hiring decisions. The magistrate judge also reviewed the First Amendment claims and found that the evidence established that the defendants did not deprive Dr. Schley of his rights under this amendment.

In sum, we detect neither reversible error in procedure nor failure in the College's proof.

AFFIRMED

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

DONALD G. SCHLEY,

Plaintiff,

v.

COLLEGE OF CHARLESTON and MARTIN PERLMUTTER,

Defendants.

Civil Action No. 3:92-3350-22AK

Entered: February 8, 1995

ORDER

This is an action for employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. The plaintiff, Dr. Donald G. Schley, claims that the defendants, the College of Charleston and Dr. Martin Perlmutter, discriminated against him on the basis of his religion (Christianity) when he applied on three separate occasions for tenure-track positions at the College of Charleston.

By consent of the parties, a nonjury trial was conducted in Charleston, South Carolina, on January 24-26, 1995. At trial, testimony was taken and a number of exhibits were entered into evidence. After consideration of all the evidence, the following findings of fact and conclusions of law are made.

Findings of Fact

1. The College of Charleston (the College) is a state-supported institution in South Carolina. The College's religious studies program, begun in the mid-1980s, is part of what is called the Department of Philosophy and Religious Studies (the Department). During the times relevant to this lawsuit, the College has been in the process of building the faculty that would constitute the religious studies program. During all times relevant to this lawsuit, the defendant Dr. Martin Perlmutter served as chairman of the Department.

2. The plaintiff received his Ph.D. in Old Testament from Emory University in 1987. Prior to that, the plaintiff graduated with honors from Eckerd College, received his master's degree from the Candler School of Theology (affiliated with Emory University), and passed doctoral exams at George-August Universitat, Gottigen, Germany.

3. Prior to graduating from Emory University, the plaintiff taught Old and New Testament courses (1980-81) and elementary and intermediate Hebrew (1984-87) at Candler School of Theology. He also taught western history and philosophy at Dekalb College of Georgia State University, prior to and after receiving his Ph.D. (1986-1989). Along with his education and work experience, Dr. Schley indicated on his original resume that he taught a Sunday School class and considered participation in church as a favored family activity.

4. Dr. Schley applied to the College for tenure-track religious studies positions as an assistant professor during three successive academic years: 1988-89, 1989-90, and 1990-91. The position of assistant professor is, according to all of the testimony at trial, an entry-level position. The College followed similar hiring procedures each of these years.

5. The hiring procedures used by the College are as follows. The Department placed advertisements in the appropriate educational magazines and journals inviting

candidates to apply for the position. To be minimally qualified for these positions, an applicant needed to be either near completion of his Ph.D. or hold a Ph.D. in the appropriate area. The College's advertisements resulted in a large number of applicants, between 100-300 applicants for each job search at issue. The Department Hiring Committee (consisting of the Chair plus two to four other tenured and tenure-track faculty members) screened the applications and made a first cut (down to 50-70 applications).

The Hiring Committee (at this point with the advisement of the other tenured and tenure-track faculty in the Department) then made a second cut, identifying all those applicants the Department wished to interview. Most of these finalists (14-18 in number) were interviewed by the Hiring Committee at the annual November meeting of the American Academy of Religion/Society for Biblical Literature (AAR/SBL). The tenured and tenure-track members of the Department, each of whom had an equal vote, voted to select candidates for recommendation. The Department made its recommendation to the Provost on two or three candidates to bring for on-campus interviews and, with the approval of the Provost and Vice President for Intercultural Affairs, held on-campus interviews. During these interviews, the candidates met with faculty, students, and administrators. The Department then ranked the candidates and made a recommendation to the President of the College, Dr. Harry Lightsey. President Lightsey made the final hiring decision.

1988-1989

Tenure-Track Assistant Professorship

6. Out of the 183 candidates for the position for which hiring occurred in the 1988-89 academic year,[1] the finalists included Dr. Susan Ackerman and Dr. Joe Hoffman.[2] The Hiring Committee that made the initial decisions as to applicants was made up of Dr. June McDaniel, Dr. Jim Abbott, and Dr. Perlmutter. Ultimately, President Lightsey offered the position to Dr. Hoffman, who accepted it but rescinded his acceptance very late in the academic year. In his testimony at trial, Dr. Schley stated without reservation that Dr. Hoffman was more qualified for this position than he. This fact remains uncontested and renders unnecessary any further analysis of the hiring in the 1988-89 academic year. Despite the fact that he did not reach the level of finalist for the tenure-track position, Dr. Schley made no comment or complaint of discrimination.[3]

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[1] This hiring would result in an appointment for the 1989-90 academic year.

[2] No person testifying at trial had any actual knowledge of the religious beliefs of either Dr. Ackerman or Dr. Hoffman.

[3] Dr. Schley testifies that he felt that he was being discriminated against from the date of his job acceptance meeting with Dr. Perlmutter (June 1989) but simply did not have the proof to go forward. However, there was no testimony that he in any way complained to any member of the faculty or in any way indicated that he was being treated unfairly as either a job applicant or as a faculty member.

7. After Dr. Hoffman rescinded his acceptance, the faculty members decided to create a visiting assistant professorship rather than attempting to fill the tenure-track position. Dr. June McDaniel recommended her friend and former classmate, Don Schley, because she knew he had not been able to procure a position in religious studies and it would provide someone to cover the Biblical studies courses for the upcoming year. She encouraged Dr. Schley to revise his resume so that it would reflect a more professional tone. Through multiple drafts, Dr. McDaniel recommended many changes to Dr. Schley's resume. She admits she felt that Dr. Schley's references to teaching at his church and to his church participation were totally irrelevant to his academic credentials, as were his references to hiking and camping, and she recommended that he remove these references.[4] Dr. McDaniel testified that these remarks would be relevant only at an institution, such as one based on religion, that would desire evidence of an applicant's family values. Dr. Schley testified that he continues today to use a resume which incorporates both the format and revisions recommended by Dr. McDaniel.

Dr. Schley's resume[5] was reviewed by the faculty members who remained on campus during the summer. He was then brought to the College for an interview with the faculty members. At no point were Dr. Schley's personal religious beliefs ever inquired into or discussed in any manner.

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[4] Dr. Schley's resume was considered by the members of the faculty who did see it to be the product of either poor judgment or bad advice.

[5] Both Dr. Schley and Dr. McDaniel testified that it was his revised resume that was submitted for the visiting professorship.

In fact, many faculty members had no idea of Dr. Schley's religious commitments until much later (1991), when he complained of discrimination.

Dr. Schley was offered a one-year visiting appointment for 1989-90. Dr. Perlmutter attempted to make clear to Dr. Schley the fact that a visiting appointment was not considered in the nature of a "try-out" for a tenure-track position. The only evidence at trial was that no visiting professor in the Department had ever been hired into a tenure-track position.

8. Dr. Perlmutter also voluntarily became involved in the process of attempting to help Dr. Schley enhance his marketability. At Dr. Schley's request, Dr. Perlmutter reviewed the letters of recommendation found in Dr. Schley's dossier. Dr. Perlmutter recommended that Dr. Schley request that certain of these be rewritten and strengthened to offer a more positive picture of Dr. Schley. There is no evidence that any of the recommendations made by either Dr. McDaniel or Dr. Perlmutter were such that they would direct Dr. Schley toward jobs at church-related schools. Further, Dr. Schley's testimony indicates that he clearly has adopted much of Dr. Perlmutter's advice in that he has not only actively solicited the updating of his letters of recommendation, but has insisted that some of the writers alter their style. The evidence found credible by this court is that Dr. Schley expressed his appreciation to Dr. Perlmutter for his help on more than one occasion.

1989-1990

Tenure-Track Assistant Professorship

9. In the fall of 1989, the Department began to attempt to fill the vacant entry level tenure-track position.[6]

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[6] This hiring process would result in an appointment for 1990-91.

Following its typical approach, the College advertised the position in the appropriate national journals. The Department was seeking an individual whose expertise was in the area of Biblical studies. The advertisements brought a response in excess of 100 applications. Dr. Schley, using his revised resume, applied for the position.

After having been on campus and within the Department for a period of a few months, Dr. Schley had gained supporters and was given thorough consideration as a candidate for the position. He was essentially in a "class by himself," as there was no need to interview him at the AAR/SBL meeting because he was working among the faculty on a regular basis. The question became whether he was among the top finalists and was to be interviewed as such.

10. The testimony establishes that although there remained a number of professors who were unaware of Dr. Schley's personal religious beliefs, there were now others who were fully aware of his convictions. Rather than acting against him, this seems to have had no effect whatsoever. Professor by professor, the testimony was without exception that there was never any concern that Dr. Schley would use his classroom to proselytize. In fact, each individual in the Department who testified spoke favorably of Dr. Schley's time in the classroom.

Therefore, despite the testimony of Dr. Dorothea Olkowski that there was a bias in the Department that affected the evaluation of an applicant if he had a religious affiliation, the weight of the evidence is to the contrary in Dr. Schley's case.[7] The evidence indicates that the opinions of individual professors grew more favorable toward Dr. Schley and he was

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[7] Dr. Olkowski admitted at trial that she had no knowledge of Dr. Schley's candidacy in any year other than 1989-90. She also testified that she did not take religion into consideration and could relate the policy to no other professor other than Dr. Perlmutter.

given further consideration as opposed to some sort of automatic elimination.

However, this court need not address the merits of Dr. Olkowski's assertion in order to reach the same conclusion. The individual testimony of the professors establishes that, as to the majority of tenure-track professors, there are neither allegations nor evidence of any unlawful factor entering into the decision-making process of individual professors. As the hiring process required a consensus and not unanimous agreement, it is the weight of each individual vote which must be viewed as significant.

Individual Voting Members of the Consensus

11. In his testimony, Dr. Richard Nunan, a tenured professor in the Department, was questioned with regard to comments he had made to the effect that an applicant who attended an institution with a pastoral mission as opposed to an academic mission might face problems in the hiring process. Dr. Nunan elucidated that these concerns could be overcome by evidence that the applicant was intent upon and had the training to teach in an academic setting.[8] This discussion by Dr. Nunan is, however, of little consequence to this action because Dr. Nunan testified that there were no such concerns with Dr. Schley. This testimony is not contradicted by the testimony of any other witness.

12. Dr. Nunan testified that, with regard to the 1989-90 application, he viewed Dr. Schley's candidacy as having merit. However, when it came down to a limited number of finalists, he viewed others as being better qualified for the position than Dr. Schley. Dr. Nunan testified that he

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[8] There is no evidence that Dr. Nunan ever discussed this as anything other than theory as the result of legal complaints brought by Dr. Schley.

felt that Dr. Schley's letters of recommendation were not very strong and that while his record of publication was respectable, it was not particularly strong for a candidate who had completed his Ph.D. four years earlier. He contrasted this with his assessment of Dr. David Frankfuter, one of the three persons judged to have better qualifications than Dr. Schley and the applicant to whom the position was eventually offered.[9] Dr. Nunan found Dr. Frankfuter's letters of recommendation to be extremely strong. He also specifically found favorable the fact that prior to receipt of his Ph.D., Dr. Frankfuter had two articles accepted for publication.[10] Dr. Nunan found Dr. Frankfuter to be articulate and to have energizing skills he believes to be good for scholarship and teaching. Finally, Dr. Nunan saw in Dr. Frankfuter promise as a religious studies scholar.

13. Professors Olkowski, Ned Hettinger, and Cheshire Calhoun are not alleged to have had any improper motivation in their assessment of Dr. Schley's candidacy. Dr. Olkowski's testimony that she supported Dr. Schley's candidacy in the second year that he applied is uncontested.[11] Dr. Hettinger was acknowledged as supporting the placement of Dr. Schley in the second tier of finalists. Dr. Hettinger's testimony revealed that he ultimately felt there were candidates who were better qualified than Dr. Schley. He bases this determination in part on academic discussions in which Dr. Schley did not appear to be able to make an

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[9] Dr. Frankfuter has since been awarded a highly competitive research fellowship, which in hindsight further reflects his outstanding qualifications for the position at the College.

[10] The only testimony is that an article that has been accepted for publication is to be treated as if it were a published article.

[11] Although the result had not yet been publicly announced, Dr. Olkowski had been awarded tenure at this time.

intellectual argument within a coherent framework. Dr. Hettinger's testimony, which remains undisputed, is that he was not aware of the fact that Dr. Schley was Christian until Dr. Schley brought his charges of discrimination in the spring of 1991. Similarly, there is no testimony that Dr. Calhoun, a tenured member of the faculty, was aware of Dr. Schley's religious beliefs when she initially supported his candidacy and then subsequently supported a final pool of candidates that did not include Dr. Schley. As Dr. Calhoun was not available to testify, the specific basis for her decision is unknown; however, neither Dr. Schley nor any other witness ever attributed any unlawful motive to Dr. Calhoun's vote.

14. All witnesses at trial agreed that Dr. McDaniel and Dr. Abbott were Dr. Schley's supporters. As with the previous four professors, there are no allegations of unlawful motive against Dr. McDaniel or Dr. Abbott. Clearly, these two individual faculty members knew more about Dr. Schley's personal religious beliefs than the rest of the faculty. Dr. McDaniel testified that although she did not have tenure at this point in her career, she was the only professor actually in religious studies and she had a vested interest in the hiring of a new member of the religious studies faculty. For this reason, she did not hesitate to make known her position on applicants to the rest of the Department, despite her untenured status. Dr. McDaniel supported Dr. Schley's consideration in the second tier of candidates, but she did not support his inclusion in the final group of candidates for the position. Although Dr. McDaniel is much less specific in her reasoning, Dr. Schley found no unlawful motive in her acts.

The other individual faculty member who is acknowledged as a strong, if not the strongest, supporter of Dr. Schley is Dr. Jim Abbott. Dr. Abbott was the most senior member of the Department, having both founded the Department and been an active participant in the establishment and organization of the religious studies program at the College of Charleston. Dr. Abbott shared a common living

area with Dr. Schley during part of the 1989-90 academic year and had the opportunity to observe Dr. Schley with students. Dr. Abbott supported Dr. Schley's inclusion as a second tier candidate but not as a final selection for the position. As to the voting process, he testified that each of the voting professors had an equal vote in the decision process. He testified further than there was active discussion among Department members concerning Dr. Schley's candidacy and that the discussion was not dominated by the Chair, Dr. Martin Perlmutter. Dr. Abbott is not alleged to have been motivated by an unlawful factor, and he testified that he did not believe Dr. Schley's Christianity played a role in the determination by other members of the Department of whether to advance his candidacy.

15. An allegation was made that Dr. Glen Lesses, a tenured professor of philosophy, might generally view a Christian applicant more harshly than other candidates. However, there has been no allegation or evidence offered that he did, in fact, apply such a view to the candidacy of Dr. Schley. Dr. Schley did not offer any testimony that would establish a casual connection between the general possibility of concern and Dr. Lesses' specific acts. Neither does the testimony of Dr. Lesses reveal that an improper motive existed. Dr. Lesses did not believe that Dr. Schley should be considered beyond the initial level in the 1989-90 application pool. He is quite specific as to his reasons for believing that other candidates were more qualified than Dr. Schley and, therefore, more appropriately advanced in the hiring process. Dr. Lesses testified that there were many highly qualified applicants for the position in 1989-90. He felt that Dr. Schley's dissertation director was less than enthusiastic and, therefore, highly detrimental to his candidacy. He acknowledged that German professors have a tendency to write recommendations in more subdued tones than do American professors. However, it was not the tone of the German letters that concerned him but the fact that they

discussed only Dr. Schley's language training and not his abilities as a religious scholar.

Dr. Lesses found Dr. Schley's publications to be fair, but was concerned with the true weight to be afforded the publication of his dissertation. A year earlier, when discussing another candidate, Dr. McDaniel had referred to the same press as a "vanity" press. Finally, Dr. Lesses did not feel that Dr. Schley's educational background was as competitive as other candidates.[12] Dr. Lesses testified that he supported both Dr. Frankfuter and Dr. Ted Bergren, two of the three finalists. Dr. Lesses' testimony that he was unaware of Dr. Schley's religious beliefs until April 1991 is uncontradicted.

16. The only allegations raised against Dr. Hugh Wilder as to an unlawful motivation in the hiring process was raised in Dr. Olkowski's testimony. She testified that she thought perhaps Dr. Wilder had mentioned Emory University's religious affiliation and Dr. Schley's participation in church in the Department hiring discussions.[13] Dr. Olkowski was not certain, however, whether it was actually Dr. Wilder who may have raised these issues. Based on this lack of certainty regarding Dr. Olkowski's comments, this cannot be found to be credible evidence of discriminatory intent by Dr. Wilder.

Dr. Olkowski alleges as further evidence of a discriminatory motive the fact that Dr. Wilder raised a question concerning Dr. Schley's student evaluations. Dr. Wilder's testimony is uncontradicted in that he was concerned that Dr. Schley may have coached students on evaluations

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[12] The only evidence was that Dr. Lesses was not aware that Emory University had a religious affiliation until Dr. Schley began to complain of discrimination.

[13] Dr. Schley made general allegations against Dr. Hugh Wilder, indicating that Dr. Wilder did not feel that it was appropriate for the Department to try to reinforce the religious beliefs of the students.

because there was an exceptional number of narrative comments. He raised this concern to the other faculty members based on his good faith belief that the sheer abnormality of it may indicate a problem.[14] All of the testimony evidenced the fact that other professors chose not to reach the same conclusion, and Dr. Schley's teaching evaluations were given full weight. No other professor indicated that he or she in any way discounted the evaluations. Without fail, the voting members of the Department credited Dr. Schley with having a good rapport with his students.

17. Dr. Wilder was specific in his reasons for finding other candidates more qualified than Dr. Schley in 1989-90. Dr. Wilder testified that he was generally satisfied with Dr. Schley's teaching at the College and that he found Dr. Schley's publishing record to be a strength for him. Dr. Wilder also considered Dr. Schley's variety of interests to be a positive factor. He felt that Dr. Schley's candidacy was weakened in that, although Dr. Schley had obtained his Ph.D. some years earlier and had teaching experience, none of his experience was in his general field of expertise, except the few months that he taught at the College of Charleston. Dr. Wilder was also specifically concerned with Dr. Schley's letters of reference, particularly the letter from Dr. Schley's two closest advisors, Dr. Max Miller and Dr. John Hayes. Dr. Wilder testified that the letters were more concerned with commenting on Dr. Schley's level of energy than his level of academic ability or promise and were without praise of Dr. Schley's scholarship.

Contrary to Dr. Schley's belief that no professor at the College understood the understated nature of German letters of recommendation, Dr. Wilder testified that most letters of recommendation received by the Department from European

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[14] Dr. Wilder testified that although a professor might typically receive 6-10 narrative responses, Dr. Schley received in excess of 100.

schools were very understated when compared to their American counterparts and were accepted as such. Dr. Wilder did not find the German letters to be a negative factor in his decision. Dr. Wilder testified that what he looks for in an applicant is some indication that the individual will improve with time. He did not see this in Dr. Schley's dossier. I find Dr. Wilder's testimony to be credible.

18. It is Dr. Perlmutter against whom Dr. Schley almost exclusively directs his allegations of improper motive. These allegations are disputed by Dr. Perlmutter. I find no evidence that Dr. Perlmutter sought to impose the policy or practice testified to by Dorothea Olkowski in that there is no evidence that he sought to automatically eliminate Dr. Schley from consideration. Secondly, I find Dr. Perlmutter's testimony that he did not use a derogatory reference to Dr. Schley's Christianity when talking with Paul Mason to be the more credible testimony. I find this in part because of Dr. Perlmutter's repeated efforts to assist Dr. Schley and because of Dr. Schley's expressed appreciation for such efforts. I find that such acts by Dr. Perlmutter would be inconsistent with the testimony of Mr. Mason.[15]

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[15] The only extraneous comment specifically alleged to have been made by Dr. Perlmutter following and, therefore, purportedly related to the 1989-90 hiring process allegedly came in his conversation with Paul Mason. In the alleged conversation, Mr. Mason was telling Dr. Perlmutter of Dr. Schley's rapport with students. After having said this, Mr. Mason felt the need to explain that Dr. Schley was not proselytizing in the classroom, to which Dr. Perlmutter allegedly replied, "Yeah, we don't want any Christers around here." Dr. Perlmutter denies ever making this comment or even being familiar with the term "Christer." No professor had ever heard Dr. Perlmutter use the term. Finally, very little weight can be afforded Mr. Mason's report because, despite the fact he wrote numerous letters following the alleged incident that complained at least in part of the College's failure to hire Dr. Schley, he did not mention this comment until the affidavit he drafted in support of Dr. Schley's EEOC complaint. Further, Mr. Mason's testimony is made less credible in light of his letter to Dr. Lightsey on April 14, 1991 (def. ex.

There is no credible testimony that Dr. Perlmutter influenced members of the Department to the point of changing their votes. Accordingly, each individual member's vote must be considered as an equal part of the consensus vote, and Dr. Schley has failed to show that his religious beliefs played a role with the majority of professors. Professors Olkowski, Hettinger, and Calhoun are all acknowledged to have supported Dr. Schley's candidacy at different stages of the hiring process, and Dr. Schley alleges no improper motivation on their part. Professors McDaniel and Abbott, who knew more about Dr. Schley's religious beliefs than the rest of the faculty, were his strongest supporters. Again, the plaintiff alleges no improper motivation on their part. Dr. Nunan testified that he found Dr. Schley's candidacy to have merit, but other candidates were better qualified. Further, Drs. Wilder and Lesses were very specific in their reasons for not supporting Dr. Schley's candidacy beyond the initial level.

19. Dr. E. P. Sanders, an expert with substantial credentials who has been involved in reviewing hundreds of resumes for religious studies position in both North America and Great Britain, substantiated the qualitative judgments made by many of the individual professors with regard to the qualifications of Dr. Schley and Dr. Frankfuter. Dr. Sanders testified that Dr. Schley's letters of recommendation "damned him with faint praise"[16] and that specifically at issue were his very cool letters from his advisors at Emory University, Dr. Max Miller and Dr. John Hayes. On the other hand, Dr. Frankfuter's letters of recommendation reflected a sound

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34), in which he makes references to "another northern Jew" and "some Yankee Jewish liberal."

[16] Dr. Sanders has made particular note of the fact that Dr. Schley's recommendations from his American professors were even less flattering than were his letters from the German professors who had been duly noted for the understated nature of their letters.

scholar full of promise. It was these letters of recommendation that he found to be the factor that, more than anything, distinguished Dr. Schley and Dr. Frankfuter.

Dr. Sanders found their teaching experience[17] and publication records (properly viewed as to each applicant's relative career position) somewhat comparable. He gave Dr. Frankfuter a slight edge as to educational background for having attended programs at Harvard and Princeton Universities, but then gave additional credit to Dr. Schley as he had already completed his doctoral dissertation. Further, Dr. Sanders testified as to the inequities of the two individuals with regard to academic training in the precise field of religious studies.[18] He found that Dr. Schley's academic endeavors had been so narrow as to restrict his qualifications in religious studies, as opposed to Dr. Frankfuter, who had laid a much more inclusive foundation for his pursuit of religious studies.

Dr. Sanders testified that, were he responsible for hiring, Dr. Schley would not have made the first cut of applicants and Dr. Frankfuter would have been brought back for an interview. This court finds that Dr. Sanders' testimony is fully credible and supports the testimony of the individual professors that their decisions were based on specific academic considerations. Therefore, it is concluded that, even were Dr. Perlmutter motivated by an unlawful motive with regard to his vote, the evidence is that the process involved required a consensus and that the majority of professors were neither

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[17] Dr. Sanders testified that as this was an entry-level position, great weight would not be given to the fact that Dr. Schley had taught several semesters more than Dr. Frankfuter.

[18] Dr. Schley argues that Dr. Frankfuter had not yet received his Ph.D., yet Dr. Wilder's testimony was that many different candidates were considered "all but dissertation" (ABD). Dr. Sanders testified that although the cramped job market makes this less common today, ABD candidates are acceptable.

alleged to have, nor did they have, an unlawful motive involved in their individual determinations to eliminate Dr. Schley from the applicant pool.

Second Visiting Assistant Professorship

20. In 1989, the Department had received approval for a third tenure-track assistant professorship, but determined that it would be unwise to hire two-thirds of its tenure-track faculty in one year. Accordingly, the faculty deferred addressing this tenure-track position until the following year. Dr. Schley accepted the College's offer of a second visiting professorship.

1990-1991

21. The Department advertised in the fall of 1990 for the tenure-track position it had been granted but had not filled the previous year. This position was for an Assistant Professor, and the area of specialization was left open (though Hinduism and New Testament were noted as already well-covered). The Hiring Committee this time consisted of Drs. Perlmutter, Calhoun, McDaniel, and Frankfuter (Dr. Abbott had been involved in the previous two years). Dr. Schley applied, along with 279 other applicants.

Faculty members were asked if any person wanted to consider Dr. Schley beyond the initial application, and no one spoke in favor of a continued review of Dr. Schley's candidacy. With a faculty allotment of only three professors, the religious studies program was not seeking a second person with expertise in Biblical Studies. In order to offer a wide range of world religions, the program particularly needed, and explicitly sought, a professor able to cover one or more of Buddhism, Islam, or American religious traditions. The fact that Dr. Schley's area of specialty overlapped to some degree with that of Dr. Frankfuter and that he did not have the breath

to cover any of the desired areas weighed against him. Dr. Sander's testimony, which I find credible, was the Dr. Schley would not be qualified for this position based on the very narrow and limited nature of his scholastic expertise. Dr. Schley's argument that the position description was designed so he would not be qualified is unsupported. The only evidence is to the contrary. The position description was drawn up well in advance of Dr. Schley's application and was not changed in anticipation thereof, and the courses taught by the individual hired, Dr. Lee Irwin, cover exactly these areas, including Buddhism, Islam, and Native American Traditions.

The finalists for the position were Dr. Richard Cogley, Dr. Daniel Shaw, and Dr. Lee Irwin. The faculty voted to recommend Dr. Irwin for the position, and President Lightsey extended an offer. Among the experiences noted by Dr. Irwin on his resume and acknowledged by Dr. Schley was his service as ministry associate for an ecumenical campus ministry made up of seven Christian demoninations. Consistent with the position of the majority of faculty members, it was not a deterrent to Dr. Irwin's candidacy that his resume referred to an apparently Christian work experience.

22. In the spring of 1991, Dr. Schley began to inform students that he would not be returning to the College of Charleston. It is during this period that two additional comments surfaced that are alleged to be evidence of discriminatory intent. David Smith, a student who graduated with departmental honors in philosophy, testified that even though he openly held Christian beliefs, he had never been treated adversely or discriminated against by any faculty member within the Department. He testified, however, that he had a conversation with Dr. McDaniel in which she indicated that members of the Department felt that someone with a commitment to religion could not teach objectively. While Mr. Smith was a very believable witness, I find credible Dr. McDaniel's testimony that this conversation was not a

discussion of the faculty's hiring practices. Dr. McDaniel also explained that the brief discussion with David Smith involved the issue of the addition of an ethicist in the area of philosophy. She testified unequivocally that no member of the Department was concerned about Dr. Schley's ability to teach. Therefore, placed in the proper context, Mr. Smith's testimony cannot be found to detract from the testimony of each of the individual professors directed specifically to the candidacy of Dr. Schley.

Secondly, another student, Lee Strickland, testified that in a conversation with Dr. Perlmutter in 1991, Dr. Perlmutter indicated that someone with religious convictions like Dr. Schley was not appropriate. I find the greater weight of credibility goes to Dr. Perlmutter, who testified that Mr. Strickland came to him to complain of Dr. Frankfuter's insensitivity to students. As a result of this conversation, Dr. Perlmutter suggested that Mr. Strickland speak to Dr. Frankfuter.

23. This case is all the more difficult because it is not one of an alleged bad candidate versus a good candidate for a tenure-track position. It entails literally hundreds of highly qualified academics applying for a very sparse number of positions. In each of the applications Dr. Schley made to the College of Charleston in 1988-89, 1989-90, and 1990-91, Dr. Schley's credentials were reviewed by the appropriate members of the faculty and were assessed on an academic basis. In each instance, the defendants have articulated the specific basis for the decision of each individual member of the Department, and they have been found to be without unlawful animus.

Conclusions of Law

1. This court has jurisdiction under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(f)(3).

2. Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, et seq., prohibits discrimination in employment on the basis of an individual's race, color, national origin, sex, or religion. In this case, the plaintiff alleges the defendants discriminated against him by maintaining a policy of religious discrimination and that the policy played a motivating part in the Department's decisions not to hire him for tenure-track positions for the academic years 1989-90, 1990-91, and 1991-92.

3. The role of the court has been defined as "simply to enforce Title VII, and 'Title VII does not require that the candidate whom a court considers most qualified for a particular position be awarded that position; it requires only that the decision among candidates not be discriminatory.'" Thomasko v. University of South Carolina, 41 Fair Empl. Prac. Cas. (BNA) 1032, 1037 (D.S.C. 1985) (quoting Lieberman v. Gant, 630 F.2d 60, 67 (2nd Cir. 1980); see also Smith v. University of North Carolina, 632 F.2d 316, 346 (4th Cir. 1980). In this context, the court examines the present case.

4. The plaintiff has the initial burden of making out a prima facie case of discrimination. International Broth. of Teamsters v. U.S., 431 U.S. 324, 336 (1977); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). A plaintiff can establish a prima facie case either by direct or indirect evidence. To establish a prima facie case for each tenure-track position sought by him, the plaintiff must prove:

(a) that he belongs to a [protected group];

(b) that he applied and was qualified for a job for which the employer was seeking applicants;

(c) that, despite his qualifications, he was rejected; and

(d) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications.

McDonnell Douglas, 411 U.S. at 802. See also Smith, 632 F.2d 316 (adapting McDonnell Douglas elements to the educational setting and university's decision not to promote or reappoint assistant professor).

5. The plaintiff established a prima facie case of discrimination.

6. After the plaintiff establishes a prima facie case, the burden of proof shifts to the defendants to articulate a legitimate, nondiscriminatory reason for their refusal to hire the plaintiff. See St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S. Ct. 2742, 2745 (1993) (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); see also Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 (1978), cert. denied, 444 U.S. 1045 (1980).

7. The defendant articulated a legitimate, nondiscriminatory reason for its actions, thus satisfying its burden of production under Burdine, 450 U.S. at 252-53. Consequently, the plaintiff must prove that the reasons offered by the defendant were a pretext for discrimination. Id.; McDonnell-Douglas, 411 U.S. at 802-04.

8. Upon identification of a legitimate, nondiscriminatory reason for its actions, the plaintiff failed to demonstrate by a preponderance of the evidence that the defendants' articulated reasons were pretextual.

9. Mere disagreement "about the scholarly merits of a candidate's academic work, the candidate's teaching abilities, or the academic needs of the department" is insufficient to carry the plaintiff's burden of persuasion. Zahorik v. Cornell University, 729 F.2d 85, 94 (2d Cir. 1984).

10. Courts do not decide whether a candidate's qualifications were judged incorrectly, only whether the

ultimate decision was based on an unlawful factor. Jackson v. Harvard University, 900 F.2d 464, 468 n.2 (1st Cir. 1990), cert. denied, 498 U.S. 848 (1990); Brousard-Norcross v. Augustana College Ass'n., 935 F.2d 974, 976 (8th Cir. 1991).

Conclusion

For the reasons stated above, the court concludes that the defendants have articulated legitimate, nondiscriminatory reasons for their actions, The plaintiff did not establish that these reasons were a pretext to discriminate against him on the basis of his religion. The evidence and testimony presented at trial establish that the defendants acted fairly in their consideration of the plaintiff for tenure-track positions at the College. Unfortunately, the plaintiff was just one of many qualified applicants in a highly competitive academic field.

Accordingly, the Clerk of Court is directed to enter judgment for the defendants in the case.

IT IS SO ORDERED.

/s/ WILLIAM M. CATOE, JR.
UNITED STATES MAGISTRATE JUDGE

February 3, 1995

Greenville, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

DONALD G. SCHLEY,

Plaintiff,

v.

COLLEGE OF CHARLESTON and MARTIN PERLMUTTER,

Defendants.

Civil Action No. 3:92-3350-22AK

Entered: March 10, 1995

ORDER

This matter is before the court on the plaintiff's motion to alter judgment or for a new trial pursuant to Federal Rule of Civil Procedure 59. A nonjury trial was conducted in Charleston, South Carolina, on January 24-26, 1995. The court found for the defendants. For the reasons set forth below, the plaintiff's motion for a new trial is denied, and his motion to alter judgment is granted in part and denied in part.

Motion for New Trial

"A motion for a new trial in a nonjury case ... should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." 11 Charles A. Wright & Arthur R. Miller, Civil § 2804 (1973). The plaintiff contends that he is entitled to a new trial because the district court "erroneously limited the

Plaintiff to a bench trial" when he was in fact entitled to a jury trial on his First Amendment claim (pl. memorandum at 1-2). The plaintiff did not raise the issue or make any such objection before this court at any pretrial hearing or at trial. By his silence the plaintiff waived any right to a jury trial he may have had, and he cannot now argue that this is a sufficient basis for the court to grant a new trial.

Motion to Alter Judgment

The Fourth Circuit Court of Appeals has recognized three grounds for granting a Rule 59(e) motion to alter or amend a judgment:

1) to accommodate an intervening change in controlling law;

2) to account for new evidence not available at trial; or

3) to correct a clear error of law or prevent manifest injustice.

Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993).

The plaintiff first asserts the judgment should be altered because the order failed to reflect a decision on the plaintiff's First Amendment claim (pl. memorandum at 2). There is some confusion as to whether the plaintiff's First Amendment claim was still alive at the time of trial. In his complaint, the plaintiff asserted as a first cause of action a violation of 42 U.S.C. § 1983 for deprivation of his free speech and exercise of his personal religious convictions as guaranteed by the First Amendment to the United States Constitution. The second cause of action alleged discrimination in violation of Title VII of the Civil Rights Act of 1964.

In response to the defendants' motion for summary judgment, the United States Magistrate Judge recommended that the Section 1983 claim be dismissed pursuant to the immunity granted by the Eleventh Amendment and that the motion be denied as to the plaintiff's Title VII and First Amendment claims. The court further recommended that the plaintiff be allowed to amend his complaint to seek injunctive relief and to name Professor Perlmutter as a defendant both in his individual and official capacities.

The district court granted summary judgment for the defendants on the Section 1983 claim and denied the defendants' motion on the Title VII and First Amendment claims, but did not allow the plaintiff to amend his complaint. According to the defendants, the plaintiff's first cause of action was therefore "dismissed in its entirety" (def. memorandum at 2). The plaintiff contends that the First Amendment claim survived to trial (pl. memorandum at 2).

Assuming for purposes of this order that the plaintiff's First Amendment claim was viable at trial, this court will amend its order to address the issue. Although the plaintiff claims that the defendants promoted a policy of preferring those with no religious beliefs over those who do believe, the weight of the evidence is that the defendants did not deprive the plaintiff of his First Amendment rights.

Every member of the department who testified spoke favorably of the plaintiff's performance time in the classroom. There was no concern that he would use the classroom to proselytize. Dr. Martin Perlmutter and other members of the department, including the plaintiff's witness Dr. Dorothea Olkowski, testified that support for the plaintiff's candidacy grew on his second application, when more members of the department were familiar with his religious beliefs. Further, Dr. June McDaniel, the plaintiff's closest friend in the department, testified that the plaintiff had never remarked that he felt in any way inhibited in his ability to teach at the College. The evidence shows that the final selections for the

tenure-track positions were based on academic qualifications rather than religious ones. See Court's Order, February 3, 1995, Findings of Fact ¶¶ 1-23.

The defendants met the requirements set out in Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 17 (1947), in that they were neutral in their relations with groups of religious believers and nonbelievers. Likewise, the defendants did not "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility toward religion, thus 'preferring those who believe in no religion over those who do believe.'" School District of Abington Township v. Schempp, 374 U.S. 203, 225 (1963). The evidence does not show that the defendants abridged the plaintiff's freedom of speech or that they prohibited the plaintiff from the free exercise of his religion.

The plaintiff next contends that the order should be altered to reflect that under the standard of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and the facts of the case as he views them, the defendants could not have prevailed at trial (pl. memorandum at 3-18). The plaintiff addresses this argument only to the hiring decision of academic year 1989-90, the position for which David Frankfuter was selected. The plaintiff asserts that because the court made a finding of direct evidence in its ruling on the motion for summary judgment, the trial court was prohibited from utilizing the tripartite burden of production set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Instead, the court, upon finding that the plaintiff made out a prima facie case, should have required the defendants to prove by a preponderance of the evidence that religious discrimination did not play a part in the department's decision not to hire the plaintiff (pl. memorandum at 4). Price Waterhouse, 490 U.S. at 258.

First, it is black letter law that on motion for summary judgment the court must view all of the evidence in the light most favorable to the nonmoving party (plaintiff). A trial

court is under no such restriction. The very essence of trial is that it offers the parties the opportunity to present testimony and evidence and have it weighed by the finder of fact. The plaintiff's contention that the court is restricted to a specific legal standard at trial by its weighting of evidence at the summary judgment stage is without legal support. Second, even viewing the evidence under the Price Waterhouse standard, the defendants proved by preponderance of the evidence that the same decision of academic year 1989-90 would have been reached absent the presence of religious considerations. See Court's Order, February 3, 1995, Findings of Fact ¶¶ 9-19.

The plaintiff further asserts that the court failed to understand the term "consensus" (def. memorandum at 13-15). The plaintiff contends that "consensus" is synonymous with the term "unanimous agreement" and cites dictionary definitions in support of his position. One of his sources lists as its definition a "collective opinion" or "general agreement," both of which clearly fit within the findings of the court. Again, the plaintiff addresses this argument only to the hiring decision made in the academic year 1989-90, for which David Frankfuter was hired (pl. memorandum at 3 n.1). The court accordingly found that the consensus was not affected by religious stereotyping or religious discrimination. See Court's Order, February 3, 1995, Findings of Fact ¶¶ 9-19.

Lastly, the plaintiff contends that the order should be altered to reflect a decision on the plaintiff's hostile environment claim (pl. memorandum at 18-19). In his Title VII cause of action, the plaintiff claims solely that the defendants discriminated against him in that the College "did not hire" him. At no time has the plaintiff sought to amend his complaint to add a hostile environment claim. However, now the plaintiff claims that based on his own testimony he felt depressed and inhibited in expressing his religious beliefs, and the court must render a decision as to "Plaintiff's hostile environment claim." Assuming for the purposes of this order

that such a claim was before the court, the weight of the evidence does not support a finding of hostile environment. See Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993); Court's Order, February 3, 1995, Findings of Fact ¶¶ 1-23.

As note above, Dr. McDaniel testified that the plaintiff never remarked that he felt in any way inhibited in his ability to teach at the College. The plaintiff testified that he was not even aware of the conditions that he considers "severe or pervasive" until well after the final decision not to hire him in 1991. The plaintiff's witness Dr. Olkowski testified that the department was very satisfied with his teaching. There was no concern that he would use the classroom to proselytize, and support for the plaintiff's candidacy grew after more members of the faculty were aware of his religious beliefs.

Conclusion

Therefore, based on the foregoing,

IT IS ORDERED that the plaintiff's motion for a new trial is denied.

IT IS FURTHER ORDERED that the plaintiff's motion to alter or amend the judgment is granted in part and denied in part, consistent with the above findings. The defendants' request for attorney fees and costs is denied.

IT IS SO ORDERED.

/s/ WILLIAM M. CATOE, JR.
UNITED STATES MAGISTRATE JUDGE

March 9, 1995

Greenville, South Carolina

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DONALD G. SCHLEY,
Plaintiff-Appellant,

v.

COLLEGE OF CHARLESTON;
MARTIN PERLMUTTER,
Defendants-Appellees.

No. 95-1932
CA-92-3350-2-22AK

Entered May 21, 1996

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED, that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court
/s/ Bert M. Motague
Clerk

No. 96-535

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1996

DONALD G. SCHLEY,

Petitioner,

v.

COLLEGE OF CHARLESTON AND MARTIN PERLMUTTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Is the Fourth Circuit Court of Appeals in conflict with any other court of appeals in terms of an employer's ability to hire the job applicant it finds most qualified based upon lawful job criteria?

2. Should the Supreme Court of the United States specifically define what criteria colleges and universities must use to determine if one applicant for a tenure-track position is better qualified than another?

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No. 96-535

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

Donald G. Schley ..... Petitioner,

v.

College of Charleston and
Martin Perlmutter ..... Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW.

Pursuant to Supreme Court Rules 15.1 and 24.2, Respondents College of Charleston and Martin Perlmutter offer their own statement of the case. The Fourth Circuit Court of Appeals affirmed the trial court's judgment in favor of the College of Charleston and Dr. Martin Perlmutter, in his official capacity. In so affirming, the Court of Appeals denied Dr. Schley's contention that the district court erred by denying his motion to amend his complaint and by striking his motion for a jury trial. The Court also denied Dr. Schley's assertion that the magistrate judge who conducted the trial applied an erroneous legal standard when assessing his Title VII claims.

Petitioner moved for rehearing and suggested rehearing en banc. On May 21, 1996, the Fourth Circuit denied the petition for rehearing and declined the suggestions of rehearing en banc. The Court's opinion

is reproduced in the Appendix to the Petition for Certiorari. (A. 1-9.)[1]

The United States District Court for the District of South Carolina entered judgment in favor of Respondents on February 8, 1996. That Order is unpublished but is reproduced in the Appendix to the Petition for Certiorari. (A. 10-31.) Following the entering of judgment for Respondents, Petitioner moved to alter judgment and for a new trial. The trial court denied the motion for a new trial and amended the judgment in part and denied in part with the ultimate judgment in favor of Respondents remaining in tact. This Order is contained in the Appendix to the Petition for Certiorari. (A. 32-37.)

Prior to trial, Respondents filed a Motion for Summary Judgment seeking dismissal as to Dr. Schley's two causes of action, Title VII and Section 1983 on alternative grounds. The United States District Court dismissed Dr. Schley's Section 1983 claim and left in place his Title VII claim. (A. 6.)

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[1] References to the Appendix to the Petition for Writ of Certiorari will be denoted as "A.," followed by the appropriate page number(s).

B. CORRECTION OF MISSTATEMENTS IN THE PETITION.

The opinion of the Court of Appeals correctly sets forth the facts of the case. (A. 1.) The opinion of the trial court also correctly states the facts and in further detail. (A. 10.) In the interest of brevity, Respondents respectfully direct the Court's attention to either of the lower court's opinion.

Pursuant to United States Supreme Court Rule 15.2, Respondents bring the following misstatements of facts contained in the Petition to the Court's attention. Petitioner mischaracterizes the facts of this case by selecting out those few bits that appear to be favorable to him. This selective presentation of facts is deceiving and is not reflective of the totality of the evidence in the case.

Dr. Schley's statement that the prevailing candidate met none of the objective qualifications for the tenure-track position is simply false and flies in the face of the findings of fact by the lower courts. (A. 4, 5, 18-23.) Dr. Frankfurter was qualified not only with regard to the stated criteria but with regard to the more subjective criteria as well. The faculty members clearly

defined the criteria used for all candidates. The facts as asserted by Dr. Schley would require this Court to ignore the actual criteria and apply criteria as defined by Dr. Schley. An expert witness testified at trial as to the comparison of qualifications of Dr. Frankfurter and Dr. Schley, and he reviewed differences in the credentials as well and believed Dr. Frankfurter to be the more qualified candidate.

Dr. Schley incorrectly states as fact that the College imposed upon him a policy that would eliminate any person the Department viewed as likely to proselytize. This statement is against the overwhelming weight of the evidence. While Dr. Schley raised the theory of such a policy, discussion of the policy never went further because the testimony established that no such policy came into play with the individuals participating in the hiring decisions involving Dr. Schley. The individual professors participating in the hiring decision had no concern that Dr. Schley would proselytize in the classroom and, in fact, believed that Dr. Schley was good in the classroom. There was no evidence that any member of the faculty was concerned that Dr. Schley would proselytize. Petitioner quotes

limited portions of Dr. Nunan's testimony out of its full context without indicating that it is a discussion of a year other than that in issue[2] and totally avoids the testimony of the other faculty members and the findings of fact of both the district court and the Court of Appeals.

Dr. Schley also raises the issue of the recommendations made by Drs. Perlmutter and McDaniel that he alter his curriculum vitae. His original curriculum vitae presented included a significant amount of personal (nonacademic) information such as information about his wife's putting him through school, his hiking with his father, and his teaching Sunday school. His close friend on the faculty, Dr. McDaniel, advised Dr. Schley that she felt personal information was not appropriate and suggested he follow the format recommended by the University of Chicago. Dr. Perlmutter, Chair of the Department at the time, recommended that Dr. Schley return to some of the sources of his recommendations and not only request

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[2] Dr. Schley admitted that a more qualified candidate was selected in both the 1988-89 and 1990-91 selection processes.

they be updated but request that some of his former professors strengthen their recommendations. It was this revised curriculum vitae that was presented for consideration in application for the tenure-track position. Several of the faculty members were unaware of Dr. Schley's religious beliefs during the relevant period.

Contrary to what might be assumed from the facts set forth by Petitioner, the friend who sat on the search committee and warned him "not to reveal his political and religious views" did so only because "he had a tendency to get into heated arguments on these subjects." (A. 3, 4.)

Dr. Schley did not receive the tenure-track appointment because, of the over 100 applicants, he was not found to be the most qualified person for the position.

SUMMARY OF THE ARGUMENT

The Petition should be denied because no conflict exists between the courts of appeal in terms of the extent to which speech can be limited to avoid issues of the establishment of religion. Rather than producing conflicting legal analysis, the Fourth Circuit

and the Eighth Circuit reviewed vastly different fact patterns which consequently resulted in different legal results. Accordingly, there is no true conflict, and the Petition should be denied.

The Petition should be denied because there is nothing in either the finding of the trial court or that of the Court of Appeals that suggests tension between the establishment clause and the free exercise clause. Petitioner raised no issues, nor are the facts such that an argument is presented that is sufficient to support a grant of certiorari.

Finally, the Petition should be denied because this Court need not give further direction as to the qualifications for employment or the manner in which they are determined. All three of Petitioner's questions are nothing more than his opinion that the decision below was incorrect and his desire to have this Court review the lower court's application of the law to the facts. This argument is insufficient to support a grant of certiorari.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS BETWEEN THE CIRCUITS IN TERMS OF THE ESTABLISHMENT CLAUSE ALLOWING GOVERNMENTS TO PERMIT RELIGIOUS ACTIVITIES TO AFFECT AN INDIVIDUAL'S EMPLOYMENT.

Petitioner presents a question that misconstrues the findings of the Fourth Circuit. Petitioner incorrectly asserts that the Department had an "admitted" policy of screening out applicants who might be inclined to proselytize. The concurrent findings of the trial court and Court of Appeals were that no such policy was involved in the facts leading to the College's determination not to hire Dr. Schley. (A. 6, 16, 17.) This finding is well supported by the evidence. The district court found that "[p]rofessor by professor, the testimony was without exception that there was never any concern that Dr. Schley would use his classroom to proselytize. In fact, each individual spoke favorably of Dr. Schley's time in the classroom." (A. 16.) Specifically as to the testimony of Dr. Nunan upon which Petitioner relies, the district court found "[t]his

discussion by Dr. Nunan is, however, of little consequence to this action because Dr. Nunan testified that there were no such concerns with Dr. Schley. This testimony is not contradicted by any other witnesses." (A. 17.)

Without so noting, Petitioner's argument would require this Court to conclude that facts as found by the lower courts were in error. This case does not, however, present an instance in which the concurrent findings of fact should be reviewed. Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). There was no policy of automatic elimination nor was there one that effected Dr. Schley.

When viewed in light of the facts as found by the courts below rather than the highly selective facts as asserted by Dr. Schley, there is no issue that Dr. Schley might proselytize or that the College limited his free exercise of religion. Without such there can be no conflict between the circuits because the difference in the cases lies not in the application of the law but in the vastly different factual scenarios. Therefore, the Petition should not be granted because this Court does not grant certiorari to review evidence and discuss

specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925).

When comparing the circuit decisions raised in issue by Petitioner, the significant distinction in facts is manifest. In Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996), there was activity by Mr. Brown that could be construed to be of a religious nature, and the governmental agency admittedly took action against Mr. Brown based on that activity. Mr. Brown, director of the county's information services department, was reprimanded for his religious activities and was directed to "cease any activities that could be considered to be religious proselytizing, witnessing and counseling . . . ." 61 F.3d at 652. Mr. Brown was later terminated, and the county administrator admitted that his reprimand for "religious activity" was a factor in the decision to terminate Mr. Brown. 61 F.3d at 654. The Eighth Circuit conceded that the county had a legal right to ensure that the workplace was free from religious activity that harasses or intimidates, but that the order issued in the administrator's discipline ran afoul of the Constitution. The court reasoned that the limitations placed on Mr.

Brown's speech were improper because they were not narrowly tailored to the aim of prohibiting harassment. 61 F.3d at 658.

Dr. Schley never engaged in any religious activity that was of concern to the Department and was never subjected to prohibitions of religious activity as was Mr. Brown. Contrary to Dr. Schley's argument, the courts below did not find that Dr. Schley was eliminated from the hiring selection process because the faculty members believed he would proselytize or carry on religious activity of any nature. In fact, the courts found that there was no concern that he would proselytize and that he was considered a candidate well into the selection process. It is, therefore, not a conflict of the application of law that results in a different result in the holdings of the Fourth Circuit and the Eighth Circuit, but a critical difference in the underlying facts. One has no basis for arguing what the holding of the Fourth Circuit would mean in a situation presenting facts such as those in Brown because the restrictions found to be so offensive by the Eighth Circuit are not present in Dr. Schley's case.

The first question as presented by Petitioner is nothing more than his opinion that the decision below was incorrect. No direct conflict among the courts of appeal nor any conflict between this Court and a court of appeal is presented; no unsettled question of federal law is presented. Therefore, the Petition should be denied.

II. THIS CASE PRESENTS NO ISSUE DEMONSTRATING A TENSION BETWEEN THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE AND DOES NOT PRESENT A QUESTION TO BE SETTLED BY THIS COURT.

This case does not present an appropriate instance for the Court's review of the relationship between the establishment clause and the free exercise clause of the First Amendment. This is not a case in which a governmental entity either favored a religious person or a person without religion. This is not a case with facts that would raise a discussion of whether there is a tension between the establishment clause and the free exercise clause or whether they are, in fact, complementary. What Petitioner presents is a wholly academic consideration and not one raised by the facts

or the legal holdings of this case. Review is unwarranted at present because it is not "beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). The Petition should, therefore, be denied.

III. THE PETITION SHOULD BE DENIED BECAUSE THIS COURT SHOULD NOT DICTATE THE SPECIFIC QUALIFICATIONS FOR INDIVIDUAL POSITIONS.

Dr. Frankfurter, the candidate who was ultimately chosen to fill the tenure-track position, was well qualified for the entry-level teaching position. The Court of Appeals found that "[t]he witnesses testified why they believed the successful candidates' credentials were superior to those of Dr. Schley. The testimony showed no taint of discrimination, and the magistrate judge's acceptance of their explanations is amply supported by the evidence." (A. 8.)

Petitioner is now asking this Court to reject the findings of the courts below and to accept his weighting of the evidence instead. Petitioner is, in asking the question of weighting evidence in a broader sense, asking this Court to become a manager of human

resources and police the required qualifications for every job.

What Petitioner is asking of this Court is not only to declare which qualifications must be given the most weight, but also to define for employer the way they may apply those qualifications. For instance, the uncontradicted testimony was that the Department historically considered candidates who were "all but dissertation" at the time of application and offer to meet the qualification of "Ph.D. required."[3] This was in no way limited to either Dr. Frankfurter or to this one instance of hiring. Yet, Petitioner now asks this Court to redefine that qualification, that is, to find that the College could not consider a candidate who is ABD at the time of application, despite the fact that both the trial court and the Fourth Circuit found the Department to have supported its use.

This Court has found that an "employer has discretion to choose among equally qualified candidates, provided that decision is not based on unlawful criteria." Texas Dep't of Community Affairs v. Burdine, 450 U.S.

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[3] A Ph.D. is required, however, at time of appointment, that is, at the time the job begins.

248, 259, 101 S. Ct. 1089, 1096 (1981) (Title VII case which recognizes an employer's traditional management prerogative). This same reasoning was applied in an academic setting by the Fourth Circuit in Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), where the court noted that

> [u]nsure how to evaluate the requirements for appointment . . . and reluctant to interfere with the subjective scholarly judgment as to whether the aggrieved academician should be awarded the desired appointment . . . . Rather the court's review has been narrowly directed as to whether the appointment . . . was denied because of a discriminatory reason.

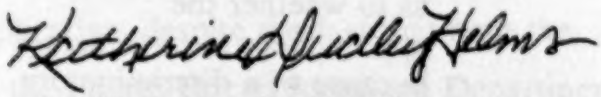
632 F.2d at 345-346 (citations and footnotes omitted). Petitioner phrases the question as one seeking definition of which criteria a court will use in reviewing qualification, when the true issue is one of grossly limiting the criteria used by the employer. Both lower courts found in Dr. Schley's case that the criteria was

nondiscriminatory and the reasoning of the Department was amply supported. (A. 8, 28.) There is nothing in this matter that suggests the Court should exercise what is normally the employer's management prerogative in making an employment decision. The Petition should be denied.

CONCLUSION

The College of Charleston and Dr. Perlmutter pray that this Court deny the Petition for Writ of Certiorari because the cause presents no issue appropriate for the Court's review and because the lower court's analysis was not in error.

Respectfully submitted,



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